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# In the Supreme Court of the United States

OCTOBER TERM, 1967.

No. 1232.

ROBERT GENE HOLBROOK,

*Petitioner,*

vs.

UNITED STATES OF AMERICA.

## PETITION FOR A WRIT OF CERTIORARI
To the United States Court of Appeals
For the Sixth Circuit.

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# In the Supreme Court of the United States

OCTOBER TERM, 1967.

No. _____.

ROBERT GENE HOLBROOK,

*Petitioner,*

vs.

UNITED STATES OF AMERICA.

## PETITION FOR A WRIT OF CERTIORARI To the United States Court of Appeals For the Sixth Circuit.

Robert Gene Holbrook, your Petitioner, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit entered in the above-entitled case on February 16, 1968.

## OPINIONS BELOW.

There was no formal opinion by the United States District Court for the Northern District of Ohio, Eastern Division, and no formal opinion by the United States Court of Appeals for the Sixth Circuit.

## JURISDICTION.

The judgment of the United States District Court for the Northern District of Ohio, Eastern Division (Appendix A, *infra*, p. 8) was entered on February 14, 1967. A Notice of Appeal to the Court of Appeals for the Sixth Circuit was filed on February 17, 1967, and the record on appeal was docketed in that court on February 20, 1967.

The case in the Court of Appeals was heard on February 8, 1968 and an order entered on February 16, 1968, affirming the judgment of the District Court (Appendix B, *infra*, p. 9). The jurisdiction of this Court is invoked under 28 U. S. Code, Section 1254(1).

## QUESTIONS PRESENTED.

1. Whether the District Court erred in overruling several defense objections to the summation of the Assistant United States Attorney for the United States in which the Assistant United States Attorney repeatedly made references, direct and indirect, as to the failure of defense counsel and the defendant to explain certain testimony elicited during the course of the trial, when the defendant did not testify at the trial—particularly in the light of the standards set forth in *Griffin vs. California*, 380 U. S. 609, and related cases.

2. Whether when a situation arises where the Assistant United States Attorney had commented on the defendant's failure to take the witness stand, does the instruction of the trial judge to the jury, to make absolutely no presumption of guilt and no inference of any kind from the failure of the defendant to testify, prevent the prosecutor's remarks from being prejudicial error.

3. Whether, after the Petitioner has perfected his appeal, including the filing of a brief, the Assistant United States Attorney files a certificate, signed by the court reporter who transcribed the record, attempting to change the record to amend the error apparent in the record without following the procedure outlined in Rules 36 and 39 (b) (1) of the Criminal Procedure and Civil Rule 75 (h), constitutes an unconstitutional (under the Due Process Clause) or an unlawful or an otherwise improper denial of justice.

## CONSTITUTIONAL, STATUTORY AND RULE PROVISIONS INVOLVED.

The Fifth Amendment to the Constitution of the United States provides in pertinent part as follows:

> "No person shall be compelled in any criminal case to be a witness against himself * * *."

The statute which provides that the failure of the defendant to be a witness is 18 U. S. C. Section 3481, and reads as follows:

> "In trial of all persons charged with the commission of offenses against the United States and in all proceedings in courts martial and courts of inquiry in any State, District, Possession or Territory, the person charged shall, at his own request, be a competent witness. His failure to make such request shall not create any presumption against him."

Rule 36 of Criminal Procedure reads as follows:

> "Clerical mistakes in judgments, orders or other parts of the record and errors in the record arising from oversight or omission may be corrected by the court at any time and after such notice, if any, as the court orders."

Rule 39 (b) (1) of Criminal Procedure provides as follows:

> "The rules and practice governing the preparation and form of the record on appeal in civil actions shall apply to the record on appeal in all criminal proceedings, except as otherwise provided in these rules."

Civil Rule 75 (h), incorporated by reference into Rule 39 (b) (1) of Criminal Procedure provides as follows:

> "It is not necessary for the record on appeal to be approved by the district court or judge thereof except as provided in subdivisions (m) and (n) of this rule

and in Rule 76, *but if any difference arises as to whether the record truly discloses what occurred in the district court, the difference shall be submitted to and settled by that court and the record made to conform to the truth.* If anything material to either party is omitted from the record on appeal by error or accident or is misstated therein, the parties by stipulation, or the district court, either before or after the record is transmitted to the appellate court, or the appellate court, on a proper suggestion or of its own initiative, may direct that the omission or misstatement shall be corrected, and if necessary that a supplemental record shall be certified and transmitted by the clerk of the district court. All other questions as to the content and form of the record shall be presented to the court of appeals."

## STATEMENT.

During the trial of the defendant in the District Court, defense counsel made several objections to statements made by the Assistant United States Attorney to the jury in the summation of the government's case. These objections were overruled by the trial judge and defense counsel took exceptions to the judge's rulings. The defendant was then convicted by the jury and was sentenced by the judge to imprisonment for a period of five (5) years (Appendix A, p. 8).

The Petitioner filed a Notice of Appeal and subsequently the official court reporter filed a transcript of the record of the proceedings in the trial court on April 18, 1967. This record showed that on one occasion the Assistant United States Attorney in his summation to the jury stated, "*I think you are entitled to hear from the defendants* * * *." The record also showed that defense counsel took an objection and exception to this statement.

The Petitioner then filed his brief and appendix in the Court of Appeals on July 27, 1967 alleging this statement and others made by the Assistant United States Attorney in his summation to be prejudicial error, which should have resulted in the trial judge declaring a mistrial.

Criminal Procedure Rules 36 and 39 (b) (1) which by reference incorporates Civil Rule 75 (h) provide that "If any difference arises as to whether the record truly discloses what occurred in the district court, the difference shall be submitted to and settled in the district court and the record made to conform to the truth * * *." This prescribed procedure was not followed in the district court and no order or direction was made by the district court nor by the Court of Appeals correcting the original record and no order has been put on to date. Also, see *Butler vs. United States,* 188 F. 2d 24, which case states: "Under federal rule permitting court in criminal case to correct or modify record, supplemental proceeding, either before or after appeal has been noted, would be proper if court stenographer has recorded some part of proceeding incorrectly, or has accidentally omitted something." The *Petitioner was given no notice or hearing on the filing of the certification of the court reporter but was merely mailed a copy of the certification by the court reporter. There were no supplemental proceedings had and the defense was not given an opportunity at any hearing to determine how the error, if any, occurred or if an undue influence was used by the government on the court reporter who was a federal employee at the time of the trial.*

The Assistant United States Attorney on August 17, 1967 then filed in the District Court a certificate signed by the official court reporter in which the reporter certified that a typographical error was made and that the prosecutor's statement which was objected to, instead of read-

ing as follows: "I think you are entitled to hear from the defendants * * *" should read: "I think you are entitled to hear from the defense * * *."

The Court of Appeals then heard the case and without opinion found no prejudicial error in the judgment and proceedings in the District Court and affirmed the judgment (Appendix B, p. 9).

## REASONS FOR GRANTING WRIT.

1. As appears from the Statement of the Case (pages 4-5, *supra*), the defense counsel made several objections to comments made by the Assistant United States Attorney to the Jury, in the summation of the government's case in the District Court, and when the transcript of the record of the proceedings were filed by the official court reporter, the record revealed a statement made by the Assistant United States Attorney as follows: *"I think you are entitled to hear from the defendants * * *"* (Appendix C, page 9). There are numerous cases which hold that such a statement or similar remarks by a prosecutor to the jury in his summation is prejudicial error and that the failure of the trial court to declare a mistrial is reversible error. See Fifth Amendment of the United States Constitution, 18 U. S. C. Section 3481; *Wilson vs. United States,* 149 U. S. 60, 37 L. ed. 650, 13 Sup. Ct. 765; *Griffin vs. California,* 380 U. S. 609, 14 L. ed. 2d 106; *Carlin vs. United States,* 351 F. 2d 618; *Adamson vs. California,* 332 U. S. 46; *Bruno vs. United States,* 308 U. S. 287; *Deason vs. State,* 167 Tex. Cr. 324, 320 S. W. 2d 670.

2. The Assistant United States Attorney argued in his brief filed in the Court of Appeals that the instruction by the Trial Court on the matter of defendants not being required to testify and the warning that no presumption

or inference could be drawn therefrom combined with other factors gave the defendant a fair trial. The law is contrary and the cases state that even though the Trial Judge instructs the jury to dismiss comment from their minds and not permit themselves to be influenced by it or instructs the jury after argument that no inference of guilt arose against defendant because of failure to testify, prejudicial error was committed and the verdict of the jury should be set aside. *Louisiana vs. Stahl*, 236 La. 362, 107 S. 2d 670; *White vs. United States*, 314 Fed. 2d 243.

3. Also, after the defendant filed a brief in the Court of Appeals alleging the prejudicial error by the prosecutor in his summation to the jury, the Assistant United States Attorney secured a certification from the official court reporter in which the reporter certified that a typographical error had been committed and that the statement made by the prosecutor to the jury in which the prosecutor stated: "I think you are entitled to hear from the defendants * * *," as shown by the record should have contained the word "defense" instead of "Defendants."

## CONCLUSION.

For the reasons stated above, the decision of the Court of Appeals in the instant case raises a question of general importance in that the court has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by the lower court, as to call for an exercise of this Court's power of supervision.

Respectfully submitted,

BENJAMIN F. KELLY,
ARVETIS G. DARVANAN,
*Attorneys for Petitioners.*

## APPENDIX A.

**JUDGMENT OF THE UNITED STATES DISTRICT COURT.**

On this 10th day of February, 1967 came the attorney for the government and the defendant appeared in person and by Avetis Darvanan, counsel.

It is ADJUDGED that the defendant upon his plea of not guilty and a verdict of guilty, has been convicted of the offense of having wilfully and knowingly, combined, conspired, confederated, and agreed together and with each other, to commit an offense against the United States, that is, to knowingly transport in interstate commerce, a female, for the purpose of prostitution, in violation of Title 18, Section 2421, United States Code as charged in count No. 5 and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

It is ADJUDGED that the defendant is guilty as charged and convicted.

It is ADJUDGED that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of Five (5) years.

It is further ordered that the said sentence imposed be served under the Title 18, Section 408 (2) (2) United States Code.

It is further ordered that bond pending appeal is set in the sum of Ten Thousand ($10,000.00) Dollars.

## APPENDIX B.

### JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

Before: WEICK, Chief Judge, CELEBREZZE, and PECK, Circuit Judges.

This cause having come on to be heard upon the record, briefs and oral argument of counsel for the respective parties, and upon due consideration thereof, the Court finds that no prejudicial error intervened in the judgment and proceedings in the District Court.

It is therefore ORDERED that the judgment of the District Court be, and it is, hereby affirmed.

ENTERED BY ORDER OF THE COURT.

/s/ CARL W. REUSS,
*Clerk.*

## APPENDIX C.

### SUMMATION OF THE GOVERNMENT'S CASE TO THE JURY BY THE ASSISTANT UNITED STATES ATTORNEY.

(268) Now Mr. Daryanan, counsel for the defendants, will have occasion to speak to you and to argue to you on the evidence in the way most favorable to his clients, but I want you to listen for a few things when he is talking to you. I think there is a very definite explanation needed by him in order for you to make the proper determination. *I think you are entitled to hear from the defendants as to why Attorney Weitzman would come in and would testify that this document was drawn up between the* hours of nine and five, (269) whereas Mrs.

Harris and Mrs. Holbrook testified that it was drawn up in their presence with the secretary there, without the lawyer being present. Why is there this inconsistency?

*We think you are entitled to an explanation as to why Mrs. Plake,* who is now a married woman and living with her family and husband, would come in and take the witness stand and publicly insist—publicly insist, and I say that the defense must argue that point, why would she come in here and publicly insist that she was a prostitute? Why would she scream out publicly and say, I was a prostitute and I did go to Wheeling, West Virginia, and I did go to the house of prostitution there.

Mr. Darvanan: I wish to take an exception to this argument.

The Court: Overruled, proceed.

Mr. Jones: *You are entitled to have an explanation, you* saw her, why did she come into this court room and insist she had been a prostitute and that she had been transported from Warren, Ohio to Wheeling, West Virginia and that she was put in a house where she turned a trick and got money, why would she say that if it was not true.

Mr. Darvanan: I want an exception to that.

The Court: What is the reason for an exception to that? Come up to the bench here, please.

(270) (Side-bar discussion had between the Court and counsel not within the hearing of the members of the jury.)

The Court: No, you are overruled. Proceed.

Mr. Jones: Another question and a final question which I think you are entitled to listen for, or at least to listen to an explanation of that question—

Mr. Darvanan: Objection and I want an exception.

The Court: Overruled.

Mr. Jones: You are entitled to ask yourself this question, you are the judges of the fact and you are to determine what happened, and in making this determination you may ask yourself certain questions. You may form these questions and listen to counsel for the defendants give you an explanation of them, I want you to see whether he can answer this question—why, of all the men in this world, why of all the men that Mrs. Plake might have met in Warren or in North Jackson or in Farrelle, Pennsylvania or in Wheeling, West Virginia, why did Mrs. Plake pick out Michael John Groff, Michael L. Kufchak and Robert Gene Holbrook, and why did she accuse them of transporting her from Warren to Wheeling, West Virginia and putting her into Nellie Garrison's house of prostitution? Why? If that didn't happen, why would she come in and make those accusations? (271) You listen to the answer to that question. Thank you.

**ARGUMENT OF DEFENSE COUNSEL TO JURY.**

(271) The Court: Mr. Darvanan.

Mr. Darvanan: If your Honor please, Mr. Jones and ladies of the jury. Why did she accuse them? Mr. Jones did not have an offense to charge against these men, Mike Groff, Michael Kufchak and Bobby Gene Holbrook. Mr. Jones had to try to prove the charges that they had in this Indictment.

Mr. Jones wants to know why Mr. Weitzman would say that this document was drawn up between the hours of nine and five, and I will tell you why, it was because he was not there when this paper was drawn up, and he does not actually know when it was drawn up. Mr. Jones told you that you are entitled to an explanation from the defendants—

The Court: No—

Mr. Darvanan: That is what he said.

The Court: From you.

Mr. Darvanan: Then I take exception to what he said, and it is on the record.

The Court: No, you would like to make it that, but he did not say that. Proceed with your argument.

SUPREME COURT, U. S.

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UNITED STATES OF AMERICA

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*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT*

---

## MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

---

ERWIN N. GRISWOLD,
*Solicitor General,*

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*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT*

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## MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

---

After a jury trial in the United States District Court for the Northern District of Ohio, petitioner and two others were found guilty of conspiracy to transport a woman in interstate commerce for the purpose of prostitution, in violation of 18 U.S.C. 2421 (R. 1, 31). On February 10, 1967, petitioner was sentenced to imprisonment for five years pursu-

ant to 18 U.S.C. 4208(a)(2) (R. 64; Pet. App. 8). The court of appeals affirmed.

At the trial, Mrs. Kathleen Vogan Plake testified that on April 21, 1964 co-defendant Mike Groff told her he was taking her to Steubenville, Ohio, to meet petitioner, and then to Wheeling, West Virginia, to work as a prostitute (Tr. 24-25).[1] The same day petitioner, Groff and co-defendant Kufchak transported Mrs. Plake from Steubenville to Wheeling in petitioner's car (Tr. 27-28). On the following day, in Wheeling, petitioner gave Mrs. Plake a paper with the address of Nellie Garrison, the operator of a house of prostitution, and a cab driver took Mrs. Plake to this house (Tr. 35-37). There, she participated in an act of prostitution (Tr. 38-39).

Petitioner did not testify but he did offer witnesses to establish an alibi defense, that he was in New Jersey on April 20th and 21st, 1964. In support of this defense, an attorney named Weitzman testified that on April 20, 1964, between 7:00 and 10:00 p.m., petitioner was at his office in Lynden, New Jersey, for the signing of a power of attorney (Tr. 146-148). Mr. Weitzman testified that the power of attorney had been prepared some time between 9:00 a.m. and 5:00 p.m. that day in his office (Tr. 147-148). Petitioner's sister, Mrs. Harris, and his mother, Mrs. Holbrook, testified that the power of attorney was drawn up by the attorney's secretary and an insurance man in petitioner's presence during the evening of April 20 (Tr. 167, 198, 199).

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[1] "Tr." refers to the transcript of the trial testimony.

In his closing argument to the jury government counsel stated (Tr. 268-269):

> Now Mr. Darvanan, counsel for the defendants, will have occasion to speak to you and to argue to you on the evidence in the way most favorable to his clients, but I want you to listen for a few things when he is talking to you. I think there is a very definite explanation needed by him in order for you to make the proper determination. I think you are entitled to hear from the defendants as to why Attorney Weitzman would come in and would testify that this document was drawn up between the hours of nine and five, whereas Mrs. Harris and Mrs. Holbrook testified that it was drawn up in their presence with the secretary there, without the lawyer being present. Why is there this inconsistency?

The following colloquy occurred during the closing argument of defense counsel (Tr. 271):

> MR. DARVANAN: * * * Mr. Jones [government counsel] wants to know why Mr. Weitzman would say that this document was drawn up between the hours of nine and five, and I will tell you why, it was because he was not there when this paper was drawn up, and he does not actually know when it was drawn up. Mr. Jones told you that you are entitled to an explanation from the defendants—
>
> THE COURT: No—
>
> MR. DARVANAN: That is what he said.
>
> THE COURT: From you.
>
> MR. DARVANAN: Then I take exception as to what he said, and it is on the record.

> THE COURT: No, you would like to make it that, but he did not say that. Proceed with your argument.[2]

In closing argument government counsel also stated, over defense objection, that the jury was "entitled to an explanation" as to why Mrs. Plake would admit that she was a prostitute and had been transported to a house of prostitution in Wheeling if this were not true (Tr. 269-270). The government attorney also told the jury to listen for an explanation from defense counsel as to why Mrs. Plake accused the three defendants of transporting her and putting her into the house of prostitution if that did not happen (Tr. 270-271).

In the court's charge, to which defense counsel had no objection (Tr. 313), the following was included (Tr. 321):

> There is one most important matter which I wish to call to your attention. None of the defendants on trial have taken the witness stand

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[2] The district court minutes show that the reporter filed a transcript of the proceedings on April 18, 1967. Thereafter, before the case was decided by the court of appeals, the government attorney filed in the district court the following certificate of the official court reporter:

> I do hereby certify that after checking my shorthand notes of the above transcript, a typographical error was made on page 268 and line 24 reading as follows: "I think you are entitled to hear from the defendants * * *" should read: "I think you are entitled to hear from the defense * * *."

This certificate does not appear in the record presently before this Court, but it was filed as an appendix to the government's brief in the court of appeals.

> and testified. I instruct you that the law does not require a defendant in a criminal case to take the witness stand and testify, and absolutely no presumption of guilt may be raised, and no inferences of any kind may be drawn, from the failure of a defendant to testify.

Petitioner's entire argument is based upon the erroneus premise that the prosecutor made improper references to petitioner's failure to take the stand. The test as to whether there was such an improper statement is whether the language was "manifestly intended or was of such character that the jury would naturally and necessarily take it to be a comment on the failure of the accused to testify." *Knowles* v. *United States*, 224 F.2d 168, 170 (C.A. 10). Here the references complained of were not a comment upon petitioner's failure to testify; they were merely a way of calling attention to the discrepancy in the testimony of defense witnesses and the unlikelihood that the government witness would falsely accuse herself. The prosecutor was simply advising the jury that during the summation of defense counsel, which was to follow, they should listen to how he attempted to explain these matters.

In addition, the jury was emphatically instructed that "absolutely no presumption of guilt may be raised, and no inferences of any kind may be drawn, from the failure of a defendant to testify" (Tr. 321). *United States* v. *DiCarlo*, 64 F.2d 15, 17-18 (C.A. 2); *United States* v. *Edwards*, 366 F.2d 853, 871 (C.A. 2), certiorari denied *sub nom. Jakob* v. *United States*, 386 U.S. 908; *United States* v. *Wright*, 309

F.2d 735, 739 (C.A. 7), certiorari denied, 372 U.S. 929. It must be presumed that the jury followed the court's instructions. *Opper* v. *United States*, 348 U.S. 84, 95; *Delli Paoli* v. *United States*, 352 U.S. 232, 242.

As noted *supra*, n. 2, the court reporter certified that her shorthand notes indicated that the prosecutor referred to the "defense" not the "defendants" in the portion of the charge here being attacked. However, the record was never corrected by an order of either the district court or the court of appeals after the certification of the court reporter. Although the court of appeals wrote no opinion, it must be presumed that the court of appeals decided the case on the record before it without the certification of correction. It is thus irrelevant whether there was sufficient compliance with Rules 36 and 39(b)(1), F.R. Crim. P. and Rule 75(h), F.R. Civ. P. Even on the uncorrected record, the prosecutor's summation cannot be reasonably interpreted as a comment upon petitioner's failure to testify. Just prior to the phrase, "I think you are entitled to hear from the defendants", the prosecutor had called defense counsel by name and had asked for a "definite explanation" by him as to the inconsistency in the testimony of the defense witnesses (Tr. 268-269). It is also significant that, at a time when the matter was fresh in the trial judge's mind, he was certain that the prosecutor had not told the jury that they were "entitled to an explanation from the defendants", even though he thought defense counsel would "like to make it that" (Tr. 271).

It is respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
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FRED M. VINSON, JR.,
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BEATRICE ROSENBERG,
ROBERT G. MAYSACK,
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